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RIPARIAN RIGHTS V. NAVIGATION.

The power of the Federal Government to improve navigation at the expense of rights is carried further than heretofore in *Scranton v. Russell*, 21 Sup. Ct. 48, which involves the question whether a riparian owner's right of access to the navigable part of a stream, permanently lost to him by the building of a government pier to aid navigation, was a taking of private property that required compensation. Although the title to the submerged land was in the adjacent owner, it was held to be so far subject to the servitude of navigation, that the damage resulting was merely consequential. This may be modified in part by the contention of the minority not directly opposed, that the title had been bequeathed by the State of Washington to the United States.

Since Congress has no power to take private property under the Commerce Clause without making compensation (*Monongahela Navigation Co. v. United States*, 148 U. S. 312), the present case necessarily decides that the right of access, so far as the exercise of the power to regulate navigation is concerned, is not a property right. This rests chiefly upon *Gibson v. United States*, 166 U. S. 269, where the building of a dike rendering a right of access very inconvenient (in a State—Pennsylvania—where taking of property has a narrow definition) was not considered to involve a taking of property. Opposed to this is the contention of the minority that whether the right of access is property depends upon local law.

The status of land between the upland and navigable water received a very elaborate discussion in *Shively v. Bowlby*, 152 U. S. 1, where the conclusion reached was that the local law governs, subject, however, to rights reserved to the Federal Government by the Constitution. Thus, in New York, it is now settled law that riparian rights of ingress and egress are available against private persons but are subject to absolute abridgement by the State, under the implied reservation in favor of navigation. (*Sage v. Mayor of New York*, 154 N. Y. 61.) Under the Louisiana law, land itself bordering rivers and bayous is subject to be taken without compensation to construct and repair levees. (*Elbridge v. Trezevant*, 160 U. S. 452.) But if the State court, where a different interpretation prevails, were to hold that riparian rights could not be taken without compensation, the present case involves its reversal wherever the Federal servitude exists. It is questionable

whether this is not carrying the servitude of navigation too far by clinging too closely to the idea that nothing is property but the *corpus* itself. So that, while not a foot of fast land could be appropriated without compensation, one of the rights that give it value can be completely taken without pay, though both are essentially property rights and one as apt to be needed for commerce as the other. Nor is the suggestion that such rights are acquired with the possibility of being lost when the needs of navigation demand it, entitled to much weight, since the same is true of all property liable to be taken to subserve a public use. The minority seek to extend the taking of property to rights attached to, as well as to the subject of property where the question is one of a purely Federal servitude, leaving it in other cases to the local law, and this, to us, seems the sounder view.